Supreme Court of the United States

OCTOBER TERM 1944.

No. 930 (1943-4 Docket)
Nos. 68-69 (1944-5 Docket)

JOHN J. BOYLE, COUNTY TREASURER OF CUYAHOGA COUNTY; JOHN A. ZANGERLE, COUNTY AUDITOR OF CUYAHOGA COUNTY, BOARD OF COUNTY COMMISSIONERS OF CUYAHOGA COUNTY, OHIO,

Appellants,

vs.

THE UNITED STATES OF AMERICA AND FEDERAL PUBLIC HOUSING AUTHORITY.

BRIEF AMICUS CURIAE OF THE OHIO REAL ESTATE ASSOCIATION.

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INTRODUCTION

By the courtesy of Counsel for The United States of America, the Public Housing Authority and the Officials of Cuyahoga County, Ohio, in case 68, and of the City of

Cleveland in Case 69, we are permitted to submit for the consideration of the Court our views on the pending question.

The Ohio Real Estate Association is the cap sheaf, or binding blanket covering the individual Real Estate Boards of the various cities of Ohio. Its membership may be said to include all of the members of the local boards. Of these local boards, there are fifty-five whose members reside in seventy of the eighty-eight counties of Ohio.

Said Ohio Real Estate Association is a member of the National Association of Real Estate Boards, consisting of six hundred and fifty member boards, located in all of the larger cities of the forty-eight states.

The purposes of the Ohio Real Estate Association, and the National Association of Real Estate Boards, include the support of the General Welfare of Ohio, and the General Welfare of the Federal Government.

THE RELATIONSHIP OF THE STATE GOVERNMENT TO THE FEDERAL GOVERNMENT

The Ohio Real Estate Association believes firmly in the declared balance of power between the State Government and the Federal Government.

It believes that, in the interpretation of their respective powers, every presumption should be given its full weight to protect the sovereignty of both the State Government and the Federal Government.

As a correllary to this, we believe that any preference that is given to one Government that will place an undue restraint on the other, should be avoided.

In **Helwig vs. Gerhadt**, 304 U. S., 405, the court declared that:

> "• • • the implied immunity of one government and its agencies from taxation by the other should, as a principle of constitutional construction, be narrowly restricted."

LIMIT OF PROPERTY TAX IMMUNITY

In the early history of the United States, the Federal Government was the weaker entity, and the one to be protected.

However, even in the much quoted case of **McCulloch** vs. **Maryland**, 4 Wheat., 316, Chief Justice Marshall foresaw the possibility of that decision being interpreted beyond its intention and declared at page 436:

> "This opinion does not deprive the states of **any resources which they originally possessed.** It does not extend to a **tax paid by the real property of the bank, in common with the other real property within the state**, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state." (Emphasis ours.)

The prior homes of these project tenants were a resource to the State of Ohio. Immunity of their present homes from taxation, with the same service required, would remove said resources, which Chief Justice Marshall declared in **McCulloch** vs. **Maryland**, supra, would not be done:

The real estate would not then be taxed

> "in common with the other real property within the State."

In **Osborn vs. Bank of U. S.**, 9 Wheat., 867, it was declared:

> "It is true, that the property of the contractor may be taxed, as the property of the other citizens, and so may the local property of the bank." (A United States Agency.)

In **Bank vs. Commonwealth** (Ky.), 9 Wall., 353, the principle is affirmed that a state has the right to tax shares of a National Bank. Justice Miller declared at page 362:

> "That limitation is, that the agencies of the Federal Government are only exempted from State legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government."

In the scale of humanity served by the Housing Authority, the latter does not serve the pauper, nor the rich, but selects a segment of its choosing. To require its beneficiaries to pay taxes would, in the extreme case, only require the Housing Authority to change the minimum earning capacity of its beneficiaries to a point a bit further up the scale. The efficiency of the Housing Authority would in no way be impaired.

CONCURRENT RIGHTS OF TAXATION.

The Federal Government has the right to tax, and to protect its sovereignty, but nowhere is any right granted to deprive a state from protecting its sovereignty.

Story on the **Constitution**, Section 942:

> "* * * It may be admitted that a law laying a tax for the use of the United States would be supreme in its nature and legally uncontrollable. Yet a law abrogating a state tax or preventing its collection would be as clearly unconstitutional, and therefore not the supreme law."

To deprive a state of its right to tax any property, as distinguished from the Agency, would destroy State Sovereignty.

Story on the **Constitution**, Section 943:

> "Any separation of the subjects of revenue which could have been fallen upon would have amounted to a sacrifice of the interests of the Union to the power of the individual states, or of a surrender of important functions of the latter, which would have removed them to a mean provincial servitude and dependence."

TAXATION AN ATTRIBUTE OF SOVEREIGNTY

Sovereignty includes the power to tax, the power of eminent domain, and the police power. But the most essential of these is the power to tax, as, without the power to tax, all other powers are impotent. Every activity of the State must be supported by taxation. That power must be inviolate.

The children of those living in these projects cannot be educated without taxation. Conceivably, the school districts might be absorbed, or nearly so, in the projects, and no funds would be available.

Fire protection and police protection could not be furnished without tax revenue. Surely there is no provision in the Federal Constitution for the Federal Government to establish fire departments and police departments to protect projects inhabited solely by private citizens and their families, engaged in private business.

For the projects to offer and pay sums in lieu of taxes does not answer, as it is not then the State that is exercising Sovereignty, but the project is exercising Sovereignty over the State.

Fundamentally, the services of education, fire protection, police protection, etc., are not due the United States as a tax, as a military service is due, but they are for the benefit of residents of the project, just as to residents outside the projects, and are due from the Sovereign State to its subjects. That these subjects also receive benefits from another Sovereign—the United States—should not subordinate the State to the United States.

STATE TAXES

That the taxes in question are being collected by State officials for State purposes and in pursuance of State Sovereignty, must be conceded to justify consideration of this cause by the Three Judge Court that did hear the same.

Discussion of that question has been covered by appellants in their brief.

ARTICLE I SECTION VIII CLAUSE 1

In the brief of appellants, two schools are distinguished as to their interpretations of Article I, Section VIII, Clause 1. Appellants have quoted freely from **Story** on the **Constitution**, especially from sections 907 and 908.

We affirm our belief that Clause 1 is a taxing clause, and that it is exhausted when the taxes are collected and expended. We believe with Justice Story, (Sect. 908) that the clause should be interpreted as if the words "in order" were inserted and the clause read as follows:

> "* * * **In order** to pay the debts * * * and to provide for the * * * general welfare." (Boldface indicates words to be inserted.)

In the expenditure of these taxes supervision may be necessary, but such falls far short of the establishment and operation of a project that includes all the earmarks of a business. Going further, these projects are leased to non-federal management agencies. In the case in

question, the agency is a state agency whose property, used for the same purpose, would be taxable (**Columbus Metropolitan Housing Authority** vs. **Thatcher, Aud.**, 140 O. S., 38.)

Justice **Story** in his **Constitution** in Section 909 observes:

> "If the clause "to pay the debts and provide for the common defense, and general welfare of the United States" is construed to be an independent and substantive grant of power, it not only renders wholly unimportant and unnecessary the subsequent enumeration of specific powers, but it plainly extends far beyond them and creates a general authority in Congress to pass all laws which they may deem for the common defense or general welfare. Under such circumstances the Constitution would practically create an unlimited national government."

This interpretation by Justice Story is adopted by **Charles Warren** in **The Making of the Constitution**, page 476. At page 477 is added:

> "It is unnecessary to discuss this further, as Story's reasoning is everywhere now accepted."

AMENDMENT X TO CONSTITUTION OF THE UNITED STATES

If Article I Section VIII Clause 1 does in fact grant all the powers appropriate to provide for the General Welfare in its fullest interpretation, then Amendment X to the Federal Constitution and most of the other powers enumerated have no meaning and are surplusage.

Justice **Story** in his **Constitution** in Section 1908 speaking of Amendment X observes:

> "• • • Its sole design is to exclude any interpretation by which other powers should be assumed beyond those which are granted."

TAXATION BY A STATE

For many years the Supreme Court of the United States labored under the mistaken theory that a state income tax on Federal officials was a burden upon the Sovereignty of the Federal Government.

This was based on a misinterpretation of the reasoning in **McCulloch** vs. **Maryland**, supra.

In 1938, in the case of **Graves** vs. **New York**, 306 U. S., 466, prior decisions were overruled and the State of New York was declared within its rights in levying an income tax on an employee of the Home Owners' Loan Corporation.

Justice Frankfurter in a concurring opinion declared:

> "The arguments upon which **McCulloch vs. Maryland**, 4 Wheat. 316, rested had their roots in actuality. But the have been distorted by sterile refinements unrelated to affairs."

In **Northern Pacific vs. Myers**, 172 U. S., 589, title was in the United States, but tax liability to the State of Montana was recognized.

In **Thompson** vs. **Pacific**, 9 Wall., 579, exemption was claimed because of the employment of the corporation in the service of the government, but was denied, syllabus 2 declaring:

> "The point decided in **McCulloch vs. Maryland** does not establish a broader doctrine even if some of its reasoning may seem to do so."

Story in his **Constitution**, in discussing **McCulloch** vs. **Maryland**, supra, observes in Section 1052:

> "* * * But property, acquired by that corporation, (Bank of the United States) in a state, was supposed to be placed in the same condition with property acquired by an individual."

What was decided in **McCulloch v. Maryland**, supra, was that the franchises,—the entity,—the agency—could not be taxed, but does not declare that its physical property could not be taxed.

VAN BROCKLIN VS. TENNESSEE, 17 U. S., 151.

This case does not justify many of the inferences drawn from it.

The decision declares that land taken in payment of a tax due the United States shall not be taxed by a state.

This has been broadened to declare that all land taken or held by the United States in any manner, and for any purpose, shall be immune from state taxation.

Until the land taken for the tax is diverted to some particular use, it may still be considered as the tax. Instead of being greenbacks or gold, it is land. It is a form of exchange.

But, if that land is diverted to a use not authorized by the Constitution, or its immunity is not proper because of its use, it loses its caste, and should become subject to the burdens that are common to all property so used.

INSIDIOUS EFFECT OF IMMUNITY

This case is merely a test case. If immunity is established here, it will be used as a breach for a flood of other cases.

In Ohio, the value of Housing Authority property now exceeds sixty million dollars. Forty million dollars of other property has been aided or completely financed with Federal money. The title to much of this is now in a Federal Agency.

Should immunity be granted here, each of these projects will demand immunity. This will encourage other ventures by Federal Agencies to expand their holdings to the impoverishment of the State.

Already, the Laurel Homes project of Cincinnati, Ohio, has filed an appeal to this Court from a decision of the Supreme Court of Ohio, denying immunity. Their only ground for appeal is based on title.

In Ohio, all state housing projects have conveyed their millions of dollars of property to the Federal Public Housing Authority, anticipating a favorable decision in this case.

This transfer is a deliberate, unhidden subterfuge based on mere title in a Federal Agency, executed for no other purpose than to evade the decision of the Supreme Court of Ohio in the case of the **Columbus Metropolitan Housing Authority**, Appellent, vs. **Thatcher, Auditor**, et al., Appellees, 140 O. S., 38, wherein that court declared that Housing Authority property was tax-

able under Section 2, Article I of the **Constitution of Ohio**.

This Court should not aid this subterfuge.

THE POWER TO TAX IS THE POWER TO DESTROY.

We have seen that, without tax revenue, and with the obligation attaching to the state to furnish education, fire protection, police protection and many other services, the State will, as a Sovereign, be destroyed, should immunity from taxation be established and extended.

That the reverse of this could happen was resented by Justice Holmes in **Panhandle Oil Co.** vs. **Mississippi**, 277 U. S., 218, where he says of the dictum of Chief Justice Marshall in **McCulloch** vs. **Maryland**:

> "The power to tax is not the power to destroy while this court sits."

May we paraphrase this declaration by the question:

> "Will this court sit by and permit the destruction of the Sovereignty of Ohio by allowing immunity of physical property from taxation?"

GOVERNMENTAL AND PROPRIETARY FUNCTIONS

It has been asserted with confidence by counsel for the United States, that this property is not held by the Government as a proprietor, for the reason that:

> "the Federal Government exercises no proprietary powers, because it was not granted such powers by the Constitution." (page 12 in District Court brief).

We agree with this proposition, but therein lies the difficulty.

What happens when the Government has exceeded the powers granted in the Constitution?

Under the National Recovery Act, the site in question, and many other sites were acquired by the United States.

This Court declared that Act unconstitutional. What should be done with this and the other projects acquired before the act was declared unconstitutional?

Obviously, the continuance of these unconstitutional purposes cannot be Governmental. The United States cannot be a Proprietor. The result is an anomaly. That it is a Governmental function is a pure fiction. The project should be liquidated.

USE OF PROPERTY

Counsel for the United States in the District Court claimed that the use of the property should not be examined into by the Court, as it would lead to a multiplicity of suits. Their deduction is that all property, where the title is in a Federal Agency, regardless of use, should be immune without question.

This has no force except to declare that constitutional limitations should be disregarded, and all Federal activity be assumed conclusively to be within granted powers.

The statement of Judge Turner in the **Columbus Metropolitan Housing Authority** case, supra, at page 48, applies equally to the project here in question:

> "It seems to us clear that where dwellings are leased to family units for the purposes of private homes, the use of such dwellings is private and not public. Under Anglo-Saxon law and tradition, there is nothing more private than one's home. **Broom's Legal Maxims**, (9 Ed., 283; **Semayne's Case**, 5 Coke, 91, 77 Eng. Rep. R., 194. That every man's house is his castle has not yet been erased from our laws."

ENFORCEMENT OF TAX LIABILITY

It may be claimed that taxes could not be enforced against the Federal Government. Perhaps not against the Federal Government as such, but it might be enforced against the real estate, or the income of the real estate.

In the case of **Baltimore Dock Co. vs. Baltimore**, 195 U. S., 375, Justice Holmes stated at page 381:

> "It is true that commonly taxes on land create a lien paramount to all interests, and that a tax sale often has been said to extinguish all titles and to start a new one. * * *. But it needs no argument to show that a state may do less. It may tax a life estate to one, and a remainder to another, and sell only the interest of the party making default."

CONCLUSION

The Ohio Real Estate Association and the National Association of Real Estate Boards are firmly of the opinion that the Sovereignty of Ohio should be protected by this Court equally with the Sovereignty of the Federal Government.

To accomplish this, the Sovereign Power of Taxation must be preserved. As Chief Justice Marshall declared in **McCulloch vs. Maryland**, that decision does not, and we declare should not

> "* * * deprive the states of any resources which they originally possessed."

Real estate used for residence purposes, or in fact for any purpose, should bear taxes

"* * * in common with the other real property within the state."

Regardless of whether the Federal Government has the power to establish Housing Authority projects, and continue them as a Governmental function, their physical property should be taxable to the State of Ohio as other similar property in Ohio is taxable.

Such taxation is not a burden on the Sovereignty of the United States. Immunity from such taxation is a vital burden on the Sovereignty of the State of Ohio.

The decision of the special Three Judge Court under consideration should be reversed, the restraining order therein made should be dissolved, and the officials of Ohio be permitted to carry out their duties of collecting the taxes that are vital to the Sovereignty of Ohio.

Respectfully submitted,

FRANCIS M. THOMPSON,

Counsel for the Ohio Real Estate Association.

SUPREME COURT OF THE UNITED STATES.

Nos. 68-69, 388.—October Term, 1944.

The City of Cleveland, Appellant, 68 *vs.* The United States of America and Federal Public Housing Authority. John J. Boyle, County Treasurer of Cuyahoga County, et al., Appellants. 69 *vs.* The United States of America and Federal Public Housing Authority.	Appeals from the District Court of the United States for the Northern District of Ohio.
Federal Public Housing Authority, formerly United States Housing Authority, Appellant, 388 *vs.* George Guckenberger, Auditor, Hamilton County, Ohio, and Ethel Skirvin.	Appeal from the Supreme Court of the State of Ohio.

[January 2, 1945.]

Mr. Justice Roberts delivered the opinion of the Court.

These appeals present the same question of substantive law and will be dealt with in a single opinion.

In No. 68 the appellees sought an injunction against the taxing officials of Cuyahoga County, Ohio, and those of the City of Cleveland, to restrain them from attempting to assess and collect taxes, pursuant to the laws of Ohio, on lands acquired by condemnation and owned by the appellees in the city and county. A preliminary injunction was issued but, pursuant to stipulation, the court proceeded at once to hear the case on the merits, and entered a final injunction.[1]

The lands involved were acquired by the United States by condemnation under the National Recovery programme for low-cost housing projects. The Federal Public Housing Authority then erected low-cost dwelling units which were leased to Cleveland

[1] 52 F. Supp. 906.

Metropolitan Housing, a State of Ohio authority. The latter has sublet the units to tenants for residence purposes.

The appellant contended that the United States Housing Act of September 1, 1937,[2] is unconstitutional, because Congress has no power under the Constitution to establish low-cost housing projects.

A majority of the court below held the federal statute authorized by the Constitution.[3] Its reasoning was that even though the evils of bad housing are local in their origin, their effect may become so widespread as to create a menace to the national welfare and that Congress is empowered to deal with the subject in that aspect. The dissenting judge was of the view that the project amounted merely to an embarkation by the federal Government in a private business and that the Government could not do this in such a way as to immunize the property employed from normal state taxation to support local police and other services required by the community of which the housing project forms a part.

In No. 69 the appellees sought and were awarded an injunction against the collection of local taxes under like circumstances.

In No. 388, the United States Housing Authority applied for exemption from local property taxes pursuant to the law of Ohio[4], in respect of a housing project in Cincinnati. The real estate had been purchased by the United States and devoted to a low-cost housing project pursuant to the federal statute.[5] The application was denied. Appeal was taken to the Supreme Court of Ohio.[6] The denial was affirmed on the grounds that no exemption was permitted by the constitution and statutes of the State and that refusal of the claimed exemption was consistent with the federal Constitution.[7] An appeal to this court was perfected.

Nos. 58 and 69 were heard and decided by a district court of three judges pursuant to § 266 of the Judicial Code.[8] The appellants insist that they do not act as officers of the State in the enforcement or execution of any state statute in collecting the taxes in question, and that § 266 therefore confers no jurisdiction on a three-judge court to hear the cause. We overrule this contention.

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2 42 U. S. C. 1401 ff.
3 Art. I, § 8, cl. 1.
4 Ohio General Code, §§ 5616, 5570-1.
5 *Supra*, note 2.
6 Pursuant to §§ 1464, 1464-1 Ohio General Code (1942 Supp.).
7 143 Ohio St. 251; 55 N. E. (2d) 265.
8 28 U. S. C. 380.

The section is inapplicable to suits challenging local ordinances or statutes having only local application.[9] But these cases involve state law the application of which is state-wide.[10] If the taxing officials were, in those instances, though acting under such a law, doing so as local officials and on behalf of the locality and not as officers of the state, the section is inapplicable to suits to restrain them.[11] Here, however, the officials were enforcing state laws embodying a state-wide concern and in the State's interest, and in such a case Section 266 is applicable.[12] The jurisdiction of a court of three judges was properly invoked.

Little need be said concerning the merits. Section 1 of the Housing Act[13] declares a policy to promote the general welfare of the Nation by employing its funds and credit to assist the States and their political subdivisions to relieve unemployment and safeguard health, safety and morals of the Nation's citizens by improving housing conditions. Section 5[14] provides in part, "The Authority, including but not limited to its franchise, capital, reserves, surplus, loans, income, assets, and property of any kind, shall be exempt from all taxation now or hereafter imposed by the United States or by any State, county, municipality, or local taxing authority." Section 13 authorizes agreements by the Authority to pay annual sums, not exceeding taxes which would otherwise be paid, in lieu of taxes.[15]

Challenge of the power of Congress to enact the Housing Act must fail.[16] And Congress may exempt property owned by the United States or its instrumentality from state taxation in furtherance of the purposes of the federal legislation. This is settled by such an array of authority that citation would seem unnecessary.[17]

The judgments in Nos. 68 and 69 are affirmed and that in No. 388 is reversed.

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[9] Ex parte Collins, 277 U. S. 565; Ex parte Public National Bank, 278 U. S. 101; Rorick v. Board of Commissioners, 307 U. S. 208.

[10] See Ohio General Code §§ 5328, 5351.

[11] Ex parte Collins, *supra*; Ex parte Public National Bank, *supra*.

[12] Spielman Motor Co. v. Dodge, 295 U. S. 89; Rorick v. Board of Commissioners, *supra*, 212.

[13] 42 U. S. C. 1401.

[14] U. S. C. 1405(e).

[15] 42 U. S. C. 1413.

[16] United States v. Butler, 297 U. S. 1, 64-67; Steward Machine Co. v. Davis, 301 U. S. 548, 586; Helvering v. Davis, 301 U. S. 619, 640.

[17] See, e. g. Van Brocklin v. Tennessee, 117 U. S. 151; Pittman v. Home Owners' Loan Corp., 308 U. S. 21; Federal Land Bank v. Bismarck Lumber Co., 314 U. S. 95.